UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re: CONGOLEUM CORPORATION, *et al*., Debtors and Debtors-in-Possession.	Chapter 11 Case No. 03-51524 (KCF) Jointly Administered Honorable Judge Kathryn C. Ferguson
CONGOLEUM CORPORATION, Debtor-in-Possession, OFFICIAL COMMITTEE OF BONDHOLDERS OF CONGOLEUM CORPORATION, *et al*., As A Representative of the Debtors-In-Possession, Plaintiffs, v. ARTHUR J. PERGAMENT, as the Collateral Trustee of the Collateral Trust, on behalf of Claimants Holding Claims in Class-2 – Secured Asbestos Claims of Qualified Pre-Petition Settlement Claimants and Class 3 – Secured Asbestos Claims of Qualified Participating Claimants, *et al.* Defendants.	Adv. Pro. No. 05-06245 Adv. Pro. No. 05-16461 **Hearing Date and Time:** **January 6, 2009 at 2:30 p.m.** **Objection Deadline:** **December 30, 2008 at 5:00 p.m.**

JOINT MOTION FOR LEAVE
TO FILE AMENDED COMPLAINTS

Plaintiff Congoleum Corporation ("Plaintiff," or "Congoleum," and with Congoleum Sales, Inc. and Congoleum Fiscal, Inc., collectively, the "Debtors"), by its attorneys, Pillsbury Winthrop Shaw Pittman LLP and Okin, Hollander & DeLuca, L.L.P., along with a Representative of the Debtors-in-Possession, the Official Committee of Bondholders of Congoleum Corporation, *et al*. (the "Bondholders' Committee," collectively with the Debtors, the "Plaintiffs"), by its attorneys Akin Gump Strauss Hauer & Feld, LLP and Teich Groh, hereby move (the "Joint Motion") for an order pursuant to Federal Rule of Civil Procedure 15(a), made

applicable to Avoidance Actions by Federal Rule of Bankruptcy Procedure 7015, granting Plaintiffs leave to file a fourth amended complaint (the "Fourth Amended Complaint") in the Omnibus Avoidance Action and a first amended complaint in the Sealed Avoidance Action (the "First Amended Sealed Complaint") to add certain defendants who were inadvertently omitted from the original complaints in those actions (collectively, the "Avoidance Actions") and to amend the exhibits to those complaints to reflect current information as to law firms representing claimants who were parties to individual Pre-Petition Settlement Agreements and the Claimant Agreement.

During a reconciliation of exhibits containing law firm client lists to the complaint in these proceedings, the Debtors were made aware that certain asbestos claimants represented by David C. Thompson, P.C. (the "Thompson Firm") and by the Boechler Law Firm (the "Boechler Firm") were not named as defendants in the original complaint filed on December 2, 2005 in this Omnibus Avoidance Action or the original complaint in the Sealed Avoidance Action filed under seal on December 29, 2005. Plaintiffs seek to add such asbestos claimants as defendants in these Avoidance Actions to ensure that every Pre-Petition Settled Claimant[1] is a party to these proceedings so that the Debtors or other estate representatives may seek any available cause of action against such Pre-Petition Settled Claimants that is in the best interest of the estate.

In support of this Joint Motion, Plaintiffs respectfully state as follows:

FACTUAL BACKGROUND

1. On December 2, 2005, Congoleum filed the original complaint initiating the omnibus avoidance action (the "Omnibus Avoidance Action") Ch. 11 Case No. 03-51524, Adv. No. 05-06245 (Bankr. D.N.J.). On December 30, 2005, Congoleum filed its first amended

[1] All capitalized terms, unless otherwise noted, shall have the meanings given to them in the Amended Joint Plan dated November 14, 2008.

complaint (the "First Amended Complaint") (Adv. Pro. ECF No. 39). The First Amended Complaint named as defendants (i) the Collateral Trustee on behalf of all of the secured claimants in former Class 3, (ii) Joseph Rice and Perry Weitz, and (iii) each of the approximately 79,000 claimants who were parties to the Claimant Agreement. All of the defendants that the Debtors believed to be represented by the Boechler Firm were identified on exhibit 4 to the First Amended Complaint. Each of the defendants believed to be represented by the Thompson Firm were identified on exhibit 9 to the First Amended Complaint. Copies of exhibits 4 and 9 to the First Amended Complaint are attached hereto as Exhibit A.

2. Due to the extraordinarily large number of defendants in the Omnibus Avoidance Action, the Debtors sought and received an Order Authorizing Notice Procedures for Individual Asbestos Claimants (the "Notice Procedure Order") (Adv. Pro. ECF No. 40). Pursuant to the Notice Procedures Order, this Court authorized the Debtors to serve the summons and complaint upon defendants by serving counsel who currently represented the defendants rather than serving each individual claimant, and each such counsel was specially appointed as agent for service of process in the Omnibus Avoidance Action. Notice Procedures Order at 3.

3. The original complaint in the Omnibus Avoidance Action was served on the Boechler and Thompson Firms on December 3, 2005 by first class mail as noted in the certificate of service attached hereto as Exhibit B (Adv. Pro. ECF No. 3). The First Amended Complaint was served on the Boechler and Thompson Firms on December 30, 2005 also by first class mail as noted in the certificate of service attached hereto as Exhibit C (Adv. Pro. ECF No. 45).[2]

4. On December 28, 2005, the Bankruptcy Court approved a case management order (Adv. Pro. ECF No. 38) which provided that the Omnibus Avoidance Action would be

[2] The Second Amended Complaint and the Third Amended Complaint were also served on the Boechler and Thompson Firms by first class mail on December 6, 2006 and September 4, 2007 respectively. *See* Adv. Pro. ECF Nos. 113 and 204.

administered in three separate stages. The first stage focused on Counts I and II of the First Amended Complaint regarding alleged preferential pre-petition and/or unauthorized post-petition transfers of the Debtors' interest in property pursuant to sections 547 and 549 of the Bankruptcy Code. The second stage of the proceeding was designed to focus on (i) the avoidance and recovery of certain fraudulent transfers of property pursuant to section 548 of the Bankruptcy Code and (ii) the avoidance of liens and security interests purportedly granted by Congoleum to the Collateral Trustee pursuant to section 544 of the Bankruptcy Code. The third stage of the proceeding was to focus on the avoidance and recovery of certain preferential and fraudulent transfers of property made to (i) Joe Rice, (ii) Motley Rice, (iii) Perry Weitz and/or (iv) Weitz & Luxenberg pursuant to sections 547, 548 and 550 of the Bankruptcy Code and applicable state law, and any additional claims the Debtors might assert.

5. On December 30, 2005, the Debtor commenced the Sealed Avoidance Action by filing under seal a Complaint to Avoid and Recover Fraudulent Transfers of Property. The Sealed Avoidance Action was commenced for the purpose of preserving the claims alleged therein for the benefit of the Debtors' estates and the Plan Trustee. The Sealed Avoidance Action was filed under seal pursuant to the Bankruptcy Court's December 28, 2005 Stipulation and Order Relating to Preservation of Certain Claims (Adv. Pro. ECF No. 37) and the complaint in the Sealed Avoidance Action was not served in accordance with the Stipulation. The Stipulation and Order regarding the filing of the complaint in the Sealed Avoidance Action was made publicly available on PACER.

6. In accordance with the December 28, 2005 case management order, on January 5, 2006, the Clerk of the Bankruptcy Court issued a Summons and Notice of Pretrial Conference in an Avoidance Action upon each of the law firms identified as having clients who were parties to

the Claimant Agreement, including the Boechler and Thompson Firms. Attached hereto as Exhibit D are copies of the Summonses and Notices issued to the Boechler and Thompson Firms.

7. After its filing, there were various proceedings in the Omnibus Avoidance Action. On March 16, 2006, Congoleum filed a motion for summary judgment with respect to the issues in Counts I and II of the First Amended Complaint (ECF Doc. No. 52). On June 19, 2006, this Court issued an opinion denying Congoleum's summary judgment motions (the "Preference Opinion") (Adv. Pro. ECF. No. 102). In its opinion, the Court held that the rights that the Settling Claimants acquired in the Pre-Petition Settlement Agreements and the Claimant Agreement could not be avoided as preferential or post-petition transfers under sections 547 and 549 of the Bankruptcy Code.

8. On January 26, 2007, this Court issued its decision rejecting confirmation of the Debtors' Tenth Modified Plan (the "Tenth Plan Opinion") (ECF Doc. No. 5091). The Court held that the classification schemes in the Tenth Modified Plan did not provide substantially similar treatment for similarly situated asbestos claimants in violation of § 524(g) as applied by the Third Circuit in *Combustion Engineering Inc.*, 391 F.3d 190 (3d Cir. 2004). The Court held that "confirmation of a plan that in any way recognizes [the Pre-Petition Settled Claimants'] pre-petition security interests is not permissible." Tenth Plan Opinion at 18, 25. The Court also held that, in order to achieve equality of distribution, all asbestos personal injury claims had to be classified together in the same class. *Id.* at 18 ("This separate classification" of the asbestos claimants "renders the [Tenth Modified] Plan unconfirmable on its face.").

9. Following the Tenth Plan Opinion, mediation was resumed in a further attempt to achieve a consensual plan. Simultaneously, Congoleum continued to prosecute the Omnibus Avoidance Action. The second stage of the proceeding was designed to focus on (i) the

avoidance and recovery of certain fraudulent transfers of property pursuant to § 548 of the Bankruptcy Code and (ii) the avoidance of liens and security interests purportedly granted by Congoleum in certain insurance proceeds pursuant to § 544 of the Bankruptcy Code.

10. On May 18, 2007, the Superior Court of New Jersey, Middlesex County (the "State Court") issued a decision in Phase 1 of the coverage action (the "Coverage Action Decision"). *Congoleum Corp. v. Ace American Ins. Co.*, No. MID-L-8908-01 (N.J. Super. Ct. Law Div. May 18, 2007). After extensive pre-trial proceedings, trial and post trial briefings, the State Court concluded (i) that the Claimant Agreement was an unreasonable agreement on multiple grounds, (ii) that the defendant insurers' refusal to consent to the agreement was reasonable, and (iii) that the defendant insurers have no obligation to provide insurance for the settlement embodied in the Claimant Agreement. Coverage Action Decision at 16.

11. On June 7, 2007, the Debtors filed in the main bankruptcy case an Omnibus Objection to Settled Asbestos Personal Injury Claims of All Qualified Pre-Petition Settlement Claimants and All Qualified Participating Claimants (the "Omnibus Objection") (ECF Doc. No. 5563). Pursuant to the Omnibus Objection, the Debtors sought an order:

> (i) determining as a result of Congoleum having fully performed the Pre-Petition Settlement Agreements, Claimant Agreements and other agreements on which the Prepackaged Plan was predicated and the Coverage Action Decision, the bankruptcy classification of all Settled Asbestos Personal Injury Claims of all of the Qualified Pre-Petition Settlement Claimants (Class 2) and all of the Qualified Participating Claimants (Class 3)...; (ii) or, in the alternative, rescinding the Pre-Petition Settlement Agreements, Claimant Agreement, Security Agreement and Collateral Trust Agreement, disallowing and expunging the claims without prejudice and restoring the parties thereto to status quo ante.

Omnibus Objection at 67.

12. Although the Debtors filed the Omnibus Objection in the main bankruptcy case as a contested motion, this Court held that such claims had be to addressed in the context of an Avoidance Action because the "relief the Debtors are requesting is significant, and the Court

wants to ensure that any decision is rendered in the proper procedural framework." *See* July 27, 2007 Opinion on Omnibus Objection at 3 (ECF Doc. No. 5673).

13. Also on July 27, 2007, the Bankruptcy Court issued an opinion with respect to stage two of the Omnibus Avoidance Action (the "Security Interest Opinion") (Adv. Pro. ECF No. 147). In the Security Interest Opinion, the Court held that the security interest granted by Congoleum to the Collateral Trustee on behalf of the Pre-Petition Settled Claimants was avoidable pursuant to § 544 of the Bankruptcy Code.

14. On August 1, 2007, the Debtors filed an application for entry of default judgment with respect to the Second Amended Complaint against a number of claimants, including those represented by the Boechler Firm and those represented by the Thompson Firm (Adv. Pro. ECF No. 148). The application was based on failure to plead or otherwise defend, in spite of having been properly served. On August 1, 2007, this Court entered default judgments against all listed defendants, including those represented by the Boechler and Thompson Firms, with respect to counts V and VI of the Second Amended Complaint. (Adv. Pro. ECF No. 150).

15. As a result of the Court's direction to file certain claims asserted in the context of an Avoidance Action, on September 4, 2007, the Debtors filed a Third Amended Complaint seeking, among other things, to rescind the Claimant Agreement, the Pre-Petition Settlement Agreements, the Collateral Trust Agreement and the Security Agreement. On October 12, 2007, the Debtors filed a motion for summary judgment with respect to counts XVII, XVIII, XIX and XX of the Third Amended Complaint. On December 28, 2007, this Court ordered summary judgment in favor of the defendants on such counts (ECF Doc. No. 258). An appeal of such decision has been filed but is presently stayed.

16. On October 9, 2007, the Debtors filed an application for entry of default judgment with respect to the Third Amended Complaint against a number of claimants, including those represented by the Boechler Law Firm and the. Thompson Firm (Adv. Pro. ECF No. 180). On October 19, 2007, the court entered default judgments against all listed defendants including those represented by the Boechler and Thompson Firms, with respect to counts XVII and XVII of the Third Amended Complaint[3] (Adv. Pro. ECF No. 196).

17. On October 19, 2007, counsel to certain of the Pre-Petition Settled Claimants filed their First Amended Answer and Counterclaims to the Debtors' Third Amended Complaint ("First Amended Answer and Counterclaims") (Adv. Pro. ECF No. 199). The First Amended Answer and Counterclaims alleged, among other things, breach of the pre-petition settlement agreements. *Id.* at ¶¶ 265-82. The First Amended Answer and Counterclaims alleged that the Pre-Petition Settled Claimants were entitled to an unsecured claim against the Debtor in the amount of their individual settlements, and that such claim was a contract claim that should be paid separately from the payment of unliquidated asbestos tort claims under any plan of reorganization. *Id.* at ¶ 270. In the alternative, the Pre-Petition Settled Claimants alleged that if their claims were not treated as contract claims, such claims should be recognized and treated as a pre-petition liquidated claim in the settlement amount. *Id.* at ¶ 271. The parties have not yet briefed the issues raised in the First Amended Answer and Counterclaims.

18. On February 5, 2008, the Debtors and other parties filed their Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code of the Futures Representative, the Debtors, the Official Asbestos Claimants' Committee and the Official Committee of

[3] Certain defendant firms sought and received orders to vacate the default judgments. Neither the Thompson Firm nor the Boechler Firm, however, moved to vacate such defaults.

Bondholders for Congoleum Corporation, et al., Dated as of February 5, 2008 (the "Joint Plan") (ECF Doc. No. 6166).

19. On April 25, 2006, the Bankruptcy Court granted the Bondholder Committee's Motion to Intervene in the Omnibus Avoidance Action (Adv. Pro. ECF No. 77).

20. On June 5, 2008, this Court issued its opinion resolving preliminary objections to the Joint Plan (the "Joint Plan Opinion") (ECF Doc. No. 6575), which objections the Court chose to consider as summary judgment motions. In the Joint Plan Opinion, this Court stated that no differentiation, other than by disease level, was permissible among asbestos claimants. Joint Plan Opinion at 5.

21. As a result of a status conference held on July 14, 2008, a Case Management Order was entered by this Court on July 17, 2008 (the "July 17, 2008 Case Management Order") (ECF Doc. No. 6680), that provided, among other things, for the filing of amended complaints in the Avoidance Actions and the commencement of a new Avoidance Action. Leave was granted on July 29, 2008 to file a Fourth Amended Complaint in the Omnibus Avoidance Action.

22. Also on July 17, 2008, the Court approved a certain Stipulation and Order Regarding Assignment of Causes of Action in the Avoidance Actions to the Bondholders' Committee pursuant to which Congoleum granted and assigned to the Bondholders' Committee "standing and authority to investigate and prosecute any causes of action held by the Debtors or the Debtors' estates with the full rights and privileges, and instead of, the Debtors, with respect to any Assigned Omnibus Avoidance Action Claims…." (Adv. Pro. ECF No. 323).

23. Following extensive mediation and settlement discussions, on August 4, 2008, Congoleum, along with certain of its creditor constituencies, the Bondholders' Committee, Asbestos Claimants' Committee ("ACC") and Futures Representative ("FCR") reached an

agreement in principle on certain material terms of a plan of reorganization and a settlement of the estate's claims in the Avoidance Actions (the "Global Settlement"). The material terms of the Global Settlement were set forth in a term sheet publicly filed with the New Jersey Bankruptcy Court on August 14, 2008. As a result of the Global Settlement, the prior fourth amended complaint approved by this Court was not filed. This Court determined that the deadlines set forth in the July 17, 2008 Case Management Order were suspended.

24. Subsequently, the parties to the Global Settlement negotiated a litigation settlement agreement compromising Congoleum's avoidance actions against asbestos claimants who were parties to certain individual pre-petition asbestos settlements or the Claimant Agreement ("Pre-Petition Asbestos Claimants") as well as resolving claims with Claimants' Counsel, Joseph Rice and Perry Weitz (the "Litigation Settlement Agreement"). Pursuant to the Litigation Settlement Agreement, asbestos claimants who were parties to the Pre-Petition Settlement Agreements or Claimant Agreement with Congoleum will relinquish any and all rights under such agreements in exchange for having their underlying asbestos claims restored to *status quo ante* as they existed at the time such claimants initially filed or submitted their asbestos claims against the Debtors.

25. On October 14, 2008, certain asbestos claimants represented by the Boechler Firm and by the Thompson Firm filed an objection to the Litigation Settlement Agreement (ECF Doc. No. 6914, Adv. Pro. ECF No. 342) stating, among other things, that certain of their clients who had been identified on the exhibit lists to the Litigation Settlement Agreement were not parties to the Avoidance Actions. As of October 18, 2008, 79 claimant law firms, representing 87% of the Pre-Petition Asbestos Claimants, executed the Litigation Settlement Agreement. Following a

hearing on October 18, 2008, the Bankruptcy Court approved the Litigation Settlement Agreement.

26. On November 14, 2008, the Debtors, the ACC, and the Bondholders' Committee together filed an Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code Dated as of November 14, 2008 (the "Amended Plan") along with a related disclosure statement and a disclosure statement hearing was scheduled for December 18, 2008. The Amended Plan provides for all asbestos claimants to receive the same treatment in Class 7 and specifically any asbestos claimants who were parties to the Pre-Petition Settlement Agreements or Claimant Agreement will be required to apply anew to the Plan Trust in accordance with the Trust Distribution Procedures.

THE PROPOSED FOURTH AMENDED COMPLAINT

27. The Debtors and Bondholders' Committee propose to amend the existing complaints in the Avoidance Actions to add certain defendants who had previously been inadvertently left off the Exhibit Lists, and to update the Exhibits Lists to reflect the current law firms which represent claimants. No new causes of action have been added to the amended complaints sought to be filed and served.

28. The Debtors seek to add as additional defendants the following fourteen claimants, including two claimants represented by the Boechler Firm and twelve claimants represented by the Thompson Firm:

Boechler Firm Clients

Robert Bachmann
Richard McGough

Thompson Firm Clients

Robert Carufel
Arne Christianson

Andrew Dietz
William Ereth
Glen Griffin
Margaret Loberg
James T. Schedel
Myrna Starr
Richard Zachmeier
Olivia Mae Jetty
Harold Palmer
Fred W. Smith

(collectively, the "Additional Claimants").

29. Although the Additional Claimants had not been included in the exhibit lists to the original complaints in the Avoidance Actions, they were sent solicitation packages on the Joint Plan (and prior plans) which contained Disclosure Statements describing the bankruptcy proceedings and the Avoidance Actions, as well as the proposed plan. With respect to the Joint Plan, each of the Additional Claimants who voted on Joint Plan -- which provided that the settlements under the Claimant Agreement would be relinquished, the underlying claims would be restored to status quo ante at the time the claim was submitted to Congoleum and such claimants provided an opportunity to resubmit their claims to the Plan trust under the Trust Distribution Procedures -- voted in **favor** of the Joint Plan. Copies of such ballots -- with social security numbers redacted -- are attached to the Declaration of Kerry A. Brennan (the "Brennan Dec.") at Exhibit C.

30. As part of the proposed Fourth Amended Complaint, the Plaintiffs also seek to update the exhibit lists to include new law firms representing clients that were previously listed as being represented by other firms. For example, Munsch Hardt Kopf & Harr PC (New Exhibit 55) was not listed in the prior complaints, but now such firm represents numerous asbestos creditors that were previously named in the prior complaints as having been represented by the Pritchard Law Firm PLLC or other firms. There are an additional six firms that were not

previously listed in the prior complaints, those being Gori Julian & Associates PC (New Exhibit 82), the Law Office of John C. Dearie (New Exhibit 39), the Locks Law Firm (New Exhibit 46), Ryan A. Foster & Associates PLLC (New Exhibit 67), the Shepard Law Firm PC (New Exhibit 80), and the Ward Black Law Firm (New Exhibit 86), and similarly their respective clients were named as having been represented by other counsel in the prior complaints. Additionally, the prior complaints listed a total of five asbestos creditors that were not represented by an attorney. We have since learned that these pro se creditors have retained counsel and their names have been added to the appropriate firm lists.

31. In the event that the Amended Plan, which incorporates the Litigation Settlement Agreement, is confirmed by this Court, it is anticipated that Avoidance Actions would be dismissed because all asbestos claimants, including the Pre-Petition Settled Claimants, will be required to apply for any recovery to the Plan Trust in accordance with the Trust Distribution Procedures. As a precaution, the Plaintiffs are seeking to add these additional defendants to the Avoidance Actions in the event that further litigation of the Avoidance Actions becomes necessary. No further causes of action are being added at this time, and specifically, the Plaintiffs are not seeking to add the causes of action that were brought before this court in July 2008. However, the Plaintiffs reserve their right to further amend the complaint in the Avoidance Actions to include certain additional causes of action if the Amended Plan is not confirmed by this Court or should it prove necessary or prudent to do so.

32. A “redline” copy of the Fourth Amended Complaint for which Plaintiffs now seek leave to file in the Omnibus Avoidance Action is attached to the Brennan Dec. as Exhibit A and all of the updated exhibit lists are attached as Exhibit B. Because the Sealed Avoidance Action remains under seal, a revised complaint is not provided. However, the only changes being made

to the Sealed Avoidance Action are to the exhibit lists, which such exhibit lists are the same as the updated exhibit lists to the Omnibus Avoidance Action (attached to the Brennan Dec. as Exhibit B). The attached redline of the complaint in the Omnibus Avoidance Action compares the differences between the Third Amended Complaint and the Fourth Amended Complaint that Plaintiffs propose to file.

ARGUMENT

A. THE COURT SHOULD GRANT THE PLAINTIFFS LEAVE TO FILE THE FOURTH AMENDED COMPLAINT

33. By this Joint Motion, Plaintiffs request that this Court grant leave to file the Fourth Amended Complaint and that such amendment should relate back to the filing of the original complaint. The Supreme Court has stated that, while leave to amend under Rule 15 is not unbounded, leave should be denied only in certain exceptional circumstances, such as undue delay, bad faith or dilatory motive, undue prejudice to the opposing party or futility of amendment. *Foman v. Davis,* 371 U.S. 178, 182 (1962). The Third Circuit has "shown a strong liberality in allowing amendments under Rule 15(a)." *Bechtel v. Robinson,* 886 F.2d 644, 652 (3d Cir. 1989); *Miller v. Beneficial Management Corp.*, 844 F. Supp. 990, 998 (D. N.J. 1993).

34. The Third Circuit has interpreted the factors listed in *Foman* "to emphasize that 'prejudice to the non-moving party' is the touchstone for the denial of amendment." *Bechtel,* 886 F.2d at 652; *see also Dole v. Arco Chemical Co.*, 921 F.2d 484, 488 (3d Cir. 1990). Moreover, "the non-moving party must do more than merely claim prejudice; it must show that it [would be] unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendments been timely." *Bechtel,* 886 F.2d at 652; *see also Dole,* 921 F.2d at 488.

35. In this case, the Additional Claimants will not be unduly prejudiced by their addition to the Fourth Amended Complaint in the Omnibus Avoidance Action. First, the Additional Claimants were represented by the Boechler Firm and/or the Thompson Firm at the time of their participation in the Claimant Agreement in April 2003 and aware of Congoleum's pre-packaged reorganization. As reflected in the exhibits 4 and 9 to the original complaint attached hereto as Exhibit A, both Boechler and Thompson had clients who were properly named as defendants in the original complaints. Both Boechler and Thompson received service of the original complaint and each successive amended complaint, as well as all other papers in the Avoidance Actions. Neither Boechler nor Thompson, however, made any attempt to be involved in the Omnibus Avoidance Action. Neither Firm ever answered any of the complaints, entered an appearance or otherwise made any filing. Indeed, this Court has entered two separate Entries of Default against both the Boechler Firm and Thompson Firm with respect to the Second and Third Amended Complaints. *See* Adv. Pro. ECF Nos. 149 and 193. There is no reason to believe that the Boechler Firm or Thompson Firm would have proceeded any differently had the Additional Claimants been named originally. Thus, it cannot be said that the Additional Claimants have been unfairly disadvantaged or deprived of the opportunity to present facts or evidence which they would have offered had they been named originally.

36. Second, the Debtors have been unsuccessful on every count that has been litigated in the Omnibus Avoidance Action except for the Court's Security Interest Opinion. The security interest that was avoided by this Court pursuant to section 544 of the Bankruptcy Code was granted to *the Collateral Trustee* and not to the individual named defendants. Although the individual claimants were beneficiaries of that security interest, they were not the actual grantees of that security. Thus, when the Court avoided the security interest granted to the Collateral

Trustee, all of the beneficiaries of that security interest—including the Additional Claimants—became unsecured claimants. Moreover, as this Court is aware, the litigation concerning the avoidance of the security interest was highly contested. Counsel representing many of the defendants in this case presented a vigorous case in support of the defendants' position. Neither the Thompson Firm nor the Boechler Firm participated in that litigation. It cannot be said that either the Thompson Firm or the Boechler Firm would have affected the outcome of the Court's decision had they decided to participate on behalf of their clients.

37. Third, each of the rulings in the Omnibus Adversary Proceeding—including the Security Interest Opinion—are currently up on appeal and have been stayed. To the extent that they want to participate, the Thompson and Boechler Firms may present their cases at the appellate level. In addition, the Debtors have not yet prosecuted claims with respect to individual claims. The Thompson and Boechler Firms would be able to defend against any such claims if they are pursued.

38. Last, although the Thompson Firm lodged an Objection to the Litigation Settlement, there is reason to believe that the Additional Claimants actually support the compromise embodied in the Litigation Settlement. Each of the Additional Claimants who voted on the Joint Plan voted in favor of it. As this Court knows, the Joint Plan provided that the settlements under the Claimant Agreement would be relinquished, the underlying claims would be restored to the status quo ante at the time the original claim was submitted to Congoleum, and such claimants instead would re-submit their claims to the Plan Trust be processed according to the Trust Distribution Procedures. Accordingly, the Additional Claimants will not be prejudiced if they are joined in the Omnibus Avoidance Action because they have already agreed in effect,

to be treated in the same manner as the other asbestos claimants who had been parties to the Claimant Agreement.

39. With respect to the Sealed Avoidance Action, the complaint has not yet been served in accordance with the December 28, 2005 Stipulation and Order Relating to Preservation of Certain Claims (Adv. Pro. ECF No. 37). Thus, the Additional Claimants would not be prejudiced by their addition to the Sealed Avoidance Action.

40. For each of these aforementioned reasons, justice requires that leave to amend the complaint should be granted.

B. THE PROPOSED AMENDMENTS SHOULD RELATE BACK TO THE FILING OF THE ORIGINAL COMPLAINT

41. Rule 15(c)(3) specifically provides for the "relation back" of amended complaints that add or change parties if certain conditions are met, in which case the amended complaint is treated for statute of limitations purposes, as if it had been filed at the time of the original complaint. Fed. R. Civ. Pro. 15(c)(3); *Singletary v. Pa. Dept. of Corr.*, 266 F.3d 186, 189 (3d Cir. 2001). An amendment seeking to add a party to the complaint will relate back to the filing of the original complaint if the following requirements are met: (1) the claims in the amended complaint must arise out of the same occurrences set forth in the original complaint, (2) the party to be brought in by amendment must have received notice of the action within 120 days of its institution, and (3) the party to be brought in by amendment must have known, or should have known, that the action would have been brought against the party but for a mistake concerning its identity. Fed. R. Civ. Pro. 15(c)(3); *Arthur v. Maersk*, 434 F.3d at 203. Each of the aforementioned factors have been met in this case. The Plaintiffs request, therefore, that the addition of the Additional Claimants to the Avoidance Actions should relate back to the filing of the original complaints.

1. *The Amendments Arise Out of the Same Occurrences Set Forth in the Original Complaint*

42. The first requirement of Rule 15(c)(3) has been met. The Additional Claimants are members of the same class of defendants who were named in the original compliant. They are former Class 3 Claimants who were parties to the Claimant Agreement. Rule 15(c)(3) is satisfied because the transactions and occurrences giving rise to the claims against the Additional Claimants are identical to those set forth in the original compliant.

2. *The Additional Claimants Received Notice of the Original Complaint within the Time Required by Statute*

43. The second condition of Rule 15(c), found in Rule 15(c)(3)(A), requires that the party to be brought in by amendment must have received notice of the institution of the action within 120 days and that the party will not be prejudiced in maintaining a defense on the merits. Fed. R. Civ. P. 15(c)(3)(A). As stated by the Third Circuit in *Singletary*, "Rule 15(c)(3) notice does not require actual service of process on the party sought to be added; notice may be deemed to have occurred when a party who has some reason to expect his potential involvement as a defendant hears of the commencement of litigation through some informal means." *Singletary*, 266 F.3d at 195. Notice to the newly-named defendants may either be actual or constructive. *Id.; see also Garvin v. City of Philadelphia*, 354 F.3d 215, 222-23 (3d Cir. 2003).

44. The *Singletary* court described two methods from which a newly-named defendant may receive constructive notice: (1) the "shared attorney" method, where the newly named defendant and an originally named party are represented by the same counsel; and (2) the "identify of interest" method, where the newly-named defendant enjoys some relationship with an originally named defendant. *Id.* at 196-200; *see also Garvin*, 354 F.3d at 222-23.

45. The "shared attorney" method of imputing Rule 15(c)(3) notice "is based on the notion that, when an originally named party and the party who is sought to be added are

represented by the same attorney, the attorney is likely to have communicated to the latter party that he may very well be joined in the action." *Singletary*, 266 F.3d at 196; *Garvin*, 354 F.3d at 223.

46. In this case, the Additional Claimants shared the same attorney as certain other defendants named in the original complaint. Exhibit 4 to the original complaint listed a total of five defendants who were represented by the Boechler Firm. The original complaint was served on the Boechler Firm on December 3, 2005 by first class mail as noted in the certificate of service attached as Exhibit A (Adv. Pro. ECF No. 3)—well within the 120 day period proscribed by the statute. Thus, notice was properly given within the meaning of Rule 15(c)(3) to each of the Additional Claimants who are represented by the Boechler Firm.

47. Exhibit 9 to the original complaint identified one defendant who was represented by the Thompson Firm. The original complaint was served on the Thompson Firm on December 3, 2005 by first class mail as noted in the certificate of service attached as Exhibit A (Adv. Pro. ECF No. 3)—also well within the 120 day period proscribed by the statute. Thus, notice was properly given within the meaning of Rule 15(c)(3) to each of the Additional Claimants who are represented by the Thompson Firm.[4]

48. In addition to the "shared attorney" method of constructive notice that has been specifically endorsed by the Third Circuit, in this case the Court ordered that, with respect to the Omnibus Avoidance Action, notice to counsel would constitute notice to the individual defendants. *See* Notice Procedures Order at 3-4. Accordingly, for each of the reasons set forth

[4] In addition to the original complaint, the First Amended Complaint, Second Amended Complaint, and Third Amended Complaint in the Omnibus Avoidance Action were also served on the Boechler Firm and the Thompson Firm. *See* Certificates of Service (ECF Doc. Nos. 45, 113, 204). Pursuant to the December 28, 2005 Stipulation and Order Relating to the Preservation of Certain Claims, the complaint in the Sealed Avoidance Action was not served on any of the defendants. Neither the Boechler Firm nor the Thompson firm ever answered any of the complaints or otherwise made any filing.

herein, the second requirement of Rule 15(c)(3) also has been satisfied with respect to each of the Additional Claimants.

3. The Boechler and Thompson Firms Should Have Known that But For a Mistake, the Additional Claimants Would Have Been Named in the Omnibus Avoidance Action

49. The third condition is that the newly named party must have known, or should have known, (again, within the 120 day period) that "but for a mistake" made by the plaintiff concerning the newly named party's identity, "the action would have been brought against" the newly named party in the first place. Fed. R. Civ. P. 15(c)(3)(B). A "mistake" can result from misidentification or lack of knowledge, and occurs when an error "render[s] the plaintiff unable to identify the potentially liable party and unable to name that party in the original complaint." *See Arthur v. Maersk,* 434 F.3d at 208.

50. In this case, it was apparent that the Debtors intended to sue every claimant who was a party to the Claimant Agreement. The caption of the original complaint clearly indicated that the Collateral Trustee—*on behalf of the holders of Secured Asbestos Claims classified in Class 3*—was named as a defendant. In addition, the exhibits to the original complaint identified approximately 79,000 individual defendants who were parties to the Claimant Agreement. The complaint itself, along with each successive amended complaint, clearly indicated that all of the claimants who were parties to the Claimant Agreement and Pre-Petition Settlements were the subject of the litigation. It is apparent that the Debtors made a mistake when they omitted approximately 14 defendants from a defendant class that numbered in the tens of thousands.

51. In connection with a general reconciliation of the exhibit lists to the Avoidance Actions, the exhibit lists were updated in late July and early August 2008 and circulated to the defendants' counsel in connection with the opt-out stipulation in the Avoidance Actions and later with Litigation Settlement. Debtors' counsel spoke with David Thompson and another lawyer at

his office about the Avoidance Actions and this Court's decisions over the course of the Avoidance Actions, and provided such counsel with information by e-mail (all of which was otherwise available on PACER for all counsel).

52. The Debtors submit that the Additional Claimants were inadvertently omitted due to transcription errors made when the Debtors' counsel utilized the Kenesis database to create the exhibit lists. If not for such errors, the Additional Claimants would have been named in the original complaint. It is clear that the Additional Claimants are members of the Defendant class named in the original complaint and each successive amended complaint. For this reason, the Debtors submit that the third condition of Rule 15(c)(3) has also been satisfied.

53. For each of the above reasons, the Plaintiffs submit that they should be granted leave to file an amended complaint to add the Additional Claimants as defendants and that such amendment should relate back to the filing of the original complaints in the Avoidance Actions.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully requests that the Court enter an order granting Plaintiffs leave to file the amended complaints in the Avoidance Actions.

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Respectfully submitted,

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